Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1838

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

LIDDELL GREEN,
Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit
On Behalf of Liddell Green

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. .....

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

EUGENE C. KIRK, SR., GREGORY L. KIRK, AUDRENE HILL, DEBORAH BARNETT, WILLIAM GUY HAMILTON, LIDDELL GREEN, CAROLINE KIRK, MARVIN BONDS, EDDIE ROBERTS,
Defendants-Petitioners.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit
On Behalf of Liddell Green

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported, but is appended hereto as Exhibit A.

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1976. A petition for Rehearing and Rehearing In Banc was denied on May 17, 1976. (Exhibit B) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. A) Does 18 U.S.C. § 2518(1)(b)(iv) require identification in a wiretap application of *all* persons whom the Government has probable cause to believe will participate in conversations over the telephone line to be intercepted and who the Government has probable cause to believe is committing or has committed the crime being investigated?

B) If such identification is required, does the failure of the Government to so identify the individuals require suppression of the seized conversations?

II. Did the Government's application for a wiretap order which merely stated that it would be difficult to obtain evidence because of the nature of the narcotics operation being investigated satisfy the requirement of 18 U.S.C. § 2518(1)(c) that "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous" be given?

III. Whether the Trial Court erred in refusing to grant defendant's motions for severance and in instructing on a single conspiracy when multiple conspiracies were indicated by the evidence?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Section 2518(1)(b)(iv) of Title 18 states:

> Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> . . .
>
> (1)(b)(iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted.

2. Section 2518(1)(c) of Title 18 states:

> Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> . . .
>
> (1)(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

STATEMENT OF FACTS

A. Conviction and Sentence

Petitioner, Liddell Green, was convicted by a jury in the United States District Court for the Eastern District of Missouri on two counts of a twenty-two count indictment that charged that Petitioner, Liddell Green, a/k/a Bud, did conspire with Eugene C. Kirk, Sr., Gregory L. Kirk; Audrene Hill, a/k/a Sis; Deborah Barnett; William Guy Hamilton, a/k/a Peelhead; Caroline Kirk; Marvin Bonds; and Eddie Roberts, a/k/a Bubbles, a/k/a Bubba, to manufacture, distribute and dispense and possess with intent to manufacture, distribute and dispense a controlled dangerous substance in violation of Section 846, Title 21, United States Code, and that Petitioner, Liddell Green, did use a communication facility to facilitate a conspiracy to deal in heroin in violation of Section 843(b), Title 21, United States Code.

The District Court imposed sentences of ten years on the conspiracy Count and two years on the facility Count, sentences to run concurrent. The Court of Appeals affirmed.

B. Trial

The evidence presented by the Government considered in its most favorable light showed the following:

Between March 18, 1974, and June 18, 1974, undercover agents for the Drug Enforcement Administration (DEA) made four purchases of heroin from a James Nofles. The first of these transactions involved a black 1971 Mercury (License No. S9H-758) which was followed to a residence at 6145 Lalite in St. Louis. Later investigation revealed this was the home of Eugene Kirk, Sr. The remaining three transactions occurred in and around the residence of Gwendolyn Williams at 4762 Northland, St. Louis.

The agents arrested Nofles on August 6, 1974. After his arrest, Nofles agreed to cooperate and assist the government investigation by arranging heroin purchases in telephone conversations to be recorded by the DEA agents.

From August 6, 1974, to September 4, 1974, Nofles made six telephone calls that were recorded by the agents. All the calls were made to two telephones located at 6145 Lalite. In the first call he negotiated with Deborah Barnett and Eugene Kirk for the purchase of a quantity of heroin. The remaining five calls resulted in purchases of heroin on four separate occasions.

The heroin was delivered to Nofles at a different place for each transaction. The first time Nofles went to the residence of Audrene Hill at 5707 Mimika and returned with a package of heroin. The second time Eugene Kirk delivered the heroin to a street location in St. Louis, arriving in the same black Mercury mentioned earlier. The third transaction involved delivery by Willie West Johnson, and the last delivery was made by Gregory Kirk.

On September 25, 1974, after receiving authorization from Attorney General William Saxbe, the Government applied for a court order authorizing the interception of wire communications on two telephone lines, numbers 314/261-3057 and 314/382-8126, both lines located at 6145 Lalite. The application sought to intercept the wire communications of Eugene C. Kirk, Sr., Gregory L. Kirk, JoAnn Kirk, Willie W. Johnson, an individual known only as "Sis" and others as yet unknown concerning a conspiracy to distribute controlled substances. This request for the order was granted the same day, to run for a period of twenty days, to October 15, 1974. While the order was in effect, the Government agents intercepted 2918 phone conversations on the two phones, an average of 146 calls per day. Approximately 102 of these calls were introduced into

evidence, only four of which involved the Petitioner Liddell Green.

On October 8, 1974, a 1973 or 1974 red Cadillac Eldorado convertible parked across the street from 6145 Lalite and Petitioner Liddell Green got out and walked over to that address. The vehicle pulled to the front of that address and Mr. Green was observed returning to it and leaving. Agents from the DEA followed the Eldorado to Lambert St. Louis Airport, where Petitioner was observed emerging from the automobile and entering the terminal, proceeding to the general area of Gate 20. Later that day, at approximately Two p.m., Petitioner was observed arriving at the LaGuardia Airport, New York.

At about One p.m., October 8, 1974, William Guy Hamilton was observed parked in front of the Mound City Medical Building at Union and Northland, St. Louis. Deborah Barnett approached Hamilton and appeared to hand him a dollar bill and then departed. Earlier in the day, Deborah Barnett had been observed driving a 1961 Black Mercury from 5954 Enright to 6145 Lalite.

On October 8, Petitioner made three phone calls to Eugene Kirk, two from St. Louis and one from New York. These calls allegedly involved the purchase of heroin. On October 10, 1974, Petitioner was arrested at Lambert St. Louis Airport as he emerged from a commercial air liner. Petitioner was searched, but only an airline ticket was found.

The wire interception terminated on October 15, 1974. On October 28, 1974, search warrants were executed on the residence at 6145 Lalite and also at 5979 Summit (home of a James Nelson). A foil packet containing traces of heroin was found at the Lalite Avenue address, where Gregory Kirk and Deborah Barnett were arrested. The remaining defendants and a number of others were arrested subsequently. The convictions followed.

REASONS FOR GRANTING THE WRIT

I. A) Does 18 U.S.C. § 2518(1)(b)(iv) require identification in a wiretap application of *all* persons whom the Government has probable cause to believe will participate in conversations over the telephone line to be intercepted and who the Government has probable cause to believe is committing or has committed the crime being investigated?

B) If such identification is required, does the failure of the Government to so identify the individuals require suppression of the seized conversations?

1. The various Circuits of the United States Courts of Appeals are in conflict over this issue of suppression of wiretap evidence when the Government has failed to comply with the clear language of 18 U.S.C. § 2518(1)(b)(iv).

In its opinion in this case, the United States Court of Appeals for the Eighth Circuit responded to Petitioners' argument that the wiretap evidence should be suppressed because neither the wiretap application nor order contained the name of Deborah Barnett even though there was probable cause to believe her communications would be intercepted and probable cause to believe she was committing the crimes in question by stating:

> "There is no broad naming requirement in the statute. The Government is not required to name every person who might be recorded in the wire interception. Therefore, the fact that some of the appellants (mainly, Deborah Barnett) were not named in the application does not mean that the authorization order was invalid. The application named all the individuals whom the Government had probable cause to suspect would be involved in telephone conversations with the principal, Eugene Kirk." *United States v. Kirk*, — F.2d — (See Attached Opinion at pg. A-19).

Unfortunately, the Court does not cite any authority in support of its position, nor even mention the only Supreme Court case involving this issue, *United States v. Kahn*, 415 U.S. 143, 94 S.Ct. 977 (1974).

Yet, it seems clear that the Eighth Circuit is refusing to interpret the *Kahn* decision to require suppression of wiretap evidence if the strict requirements of 18 U.S.C. §2518(1)(b)(iv) are not met. For while such a ruling may not be expressly set out in this decision, it most certainly is in *United States v. Civella*, — F.2d —, No. 75-1522 (8th Cir. 1976), where the Eighth Circuit stated:

> "We think that if the identification requirements of the Act are satisfied with respect to the individuals who are identified originally and if defendants who were not identified originally, although they should have been, are promptly notified in substantial compliance with §2518(8)(d) of the fact and circumstances of the interception of their communications so that they may apply to the issuing judge for an order making available to them the contents of the intercepted communications, the purpose of §2518(1)(b)(iv) and 2518(4)(a) has been achieved and that there has been a sufficient substantial compliance with those subsections." Id. at pgs. 18-19

While this rationale is consistent with decisions of the Fifth Circuit, it is clearly inconsistent with the decisions of a majority of the Circuits which have considered the issue.

The Second, *United States v. Chiarizio*, 525 F.2d 289 (1975); Fourth, *United States v. Bernstein*, 509 F.2d 996; Sixth, *United States v. Donovan*, 513 F.2d 337, cert. granted 96 S.Ct. 1100 (1976); Ninth, *United States v. Turner*, 528 F.2d 143 (1975); Tenth, *United States v. Russo*, 527 F.2d 1051 (1975), and District of Columbia, *United States v. Moore*, 513 F.2d 485 (1975), Circuits have all expressly or impliedly held that if

the Government has probable cause to believe that a particular person is committing an offense for which the wiretap is sought and also has probable cause to believe that such individual is likely to use the target telephone in furtherance of such criminal activity, the application and order for a wiretap must identify such person by name. Failure to include the name requires the suppression of any wiretap evidence.

The decisions of the Eighth Circuit in this case and *Civella*, and the Fifth Circuit in *United States v. Doolittle*, 507 F.2d 1368, affrm'd en banc, 518 F.2d 500 (1975) requiring some showing of prejudice to the unnamed individual because of the absence of his name from the application and order clearly are in conflict with these other decisions and there is an urgent need for this Court to remedy this inconsistency.

2. This Court has already agreed to decide this issue by granting certiorari in *United States v. Donovan*, 513 F.2d 337, cert. granted, 96 S.Ct. 1100, 47 L.Ed 2d 310 (1976).

II. Did the Government's application for a wiretap order which merely stated that it would be difficult to obtain evidence because of the nature of the narcotics operation being investigated satisfy the requirement of 18 U.S.C. § 2518(1)(c) that "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous" be given?

1. The various Circuits of the United States Courts of Appeals are in conflict over what constitutes compliance with 18 U.S.C. § 2518(1)(c) and (3)(c).

In its opinion in this case, the United States Court of Appeals for the Eighth Circuit responded to Petitioner's argument that the Government had failed to set forth in its wiretap application

as required by 18 U.S.C. § 2518(1)(c) "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," by stating,

> "This requirement is to be reasonably construed and the application tested in a 'commonsense fashion.' *United States v. Brick*, 502 F.2d 219, 224, N. 14 (8th Cir. 1974). Viewing the instant application and affidavit in this light, it is quite obvious that the statutory requirements were met. Agent RIEFF's affidavit states in detail the reasons that normal investigative techniques had not been successful in determining the extent of the heroin operation. These reasons included inability to determine who lived with KIRK at the 6145 Lalite Avenue address, and who else was involved in his operation from the source to the retail market. The affidavit states the danger of being discovered if normal surveillance techniques were continued as a sole means of investigation. This Court cannot use the above statute to require more of the government than was done in this case." *U.S. v. Kirk, et al.*, — F.2d — at pg. A-18.

In fact, the only reasons stated in the affidavit for the lack of possible success in the use of normal investigative techniques are that:

(1) Kirk refuses to deal with a DEA undercover agent,

(2) Normal surveillance techniques have not been successful in determining who has been inside 6145 Lalite Avenue because cars which are followed to that address park in the back, out of view of surveillance,

(3) Continued surveillance would result in detection,

(4) Kirk has refused to discuss the entire scope and extent of the narcotics operation with the informant, and

(5) Record checks with other law enforcement officers have proved non-productive.[1]

The affidavit does not explain why the consensual recordings used in this case would prove ineffective nor why the fact that cars were parked in the back of the house destroyed the usefulness of surveillance of the Lalite address (especially in light

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[1] The affidavit presented with the wiretap application in pertinent part, read as follows:

XI. Normal avenues of investigation and prosecution have been tried, and are continuing to be explored but appear unlikely to be successful because of the refusal of Eugene C. Kirk, Sr., to deal directly with an undercover DEA Special Agent, who would be seeking information about those persons involved with Eugene C. Kirk, Sr., in the conspiracy to distribute heroin in the Eastern District of Missouri. On August 27, 1974, as mentioned previously, Eugene C. Kirk, Sr., refused to allow CI-1 to give his (Kirk, Sr.'s) phone number to the undercover DEA agent; but rather he indicated his unwillingness to deal with the undercover agent by instructing CI-1 to give the DEA undercover agent the number of "Bill", the person who previously delivered heroin to CI-1 on August 27, 1974.

Normal surveillance techniques have not been successful in determining who has been inside 6145 Lalite Avenue, St. Louis, Missouri, conducting narcotics transactions. When automobiles are followed to that address, they are parked in the rear which is out of view of the surveillance teams. In addition, continued surveillance of 6145 Lalite Avenue would most likely result in detection by Eugene C. Kirk, Sr., and others of the presence of the Federal Agents.

CI-1 only purchases heroin from Eugene C. Kirk, Sr., for his own use and for redistribution to others. CI-1 has not been permitted by Eugene Kirk, Sr., to become familiar with the scope of Eugene C. Kirk, Sr.'s operation and the names of the individuals involved in the redistribution process from the "source" to the retail market ("street trade"). Eugene C. Kirk, Sr., will not accept a person as a confident who does not "inject heroin" immediately after the sale by Eugene C. Kirk, Sr. An undercover Special Agent from DEA cannot pretend to be an addict.

Exhaustive record checks with law enforcement offices, both State and Federal, have proven nonproductive. None of these checks indicate the structure of Eugene C. Kirk, Sr.'s organization, the method of delivery from his source of supply, the quantities of heroin utilized by him in his operation, nor the precise size and scope of the business transacted on a daily basis. Until electronic surveillance is instituted for the purpose of detecting Eugene C. Kirk, Sr.'s nar-

of the fact that the cars were followed to that address).[2] Furthermore, there appears to be little in the facts that the alleged top man of a narcotics conspiracy would refuse to deal with more than a "trusted few," or that he would shrink from disclosing the entire scope of the operation to everyone, or that other agencies can provide little information, to distinguish this case from any other narcotics conspiracy case. Compare *United States v. Kalustian*, 529 F.2d 585 (9th Cir. 1976).

In accepting such general and conclusory statements as fulfilling the requirements of 18 U.S.C. §2518(1)(c), the Eighth Circuit has followed the path cleared by the Second Circuit in *United States v. Steinberg*, 525 F.2d 1126 (1975), cert. denied, 19 Cr.L.Rptr. 4058 (1976), where that Circuit also found compliance with Title III where the application stated little more than that an undercover agent would prove ineffective (no reasons given) and that other normal surveillance techniques would not succeed because large drug dealers are covert

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cotic related activities, further investigation of Eugene C. Kirk, Sr. would not progress. He could be arrested but knowledge of his source of supply and method of his distribution would almost be totally lacking. It appears that the most feasible and effective method of determining the full scope of Eugene C. Kirk, Sr.'s trafficking activities; that is, the identification of his source of supply for controlled substances, how the controlled substances are transported to the Eastern District of Missouri, the identities of Eugene C. Kirk, Sr.'s major customers, where the quantities of these substances are stored, and where, how and by whom deliveries of these substances are made, is through the interception of wire communication to and from telephone number (314) 261-3057 and (314) 382-8126.

[2] It should be noted that evidence obtained as a result of such visual surveillance was considered of utmost importance against the Petitioner in this case. See attached opinion at pg. A-10. Also compare the affidavit found in *United States v. Cacace*, 529 F.2d 1167 (5th Cir. 1976) per curiam opinion, as to the conclusory statement that further surveillance will result in detection.

[3] The following are the relevant sections of the affidavit submitted in the *Steinberg* case.

> "Normal investigative procedures have not succeeded in establishing the full extent of the activities conducted by Stuart L. Steinberg related to the purchase or sale of controlled substances, nor have the locations and identity of the source of Stuart L. Steinberg's supply been established. Normal investigative procedures reasonably appear to be unlikely to succeed in obtaining the evidence necessary for the following reasons:
>
> A. At this time there is now known undercover access to his supplier and no chance of developing such access because of the covert manner in which Stuart L. Steinberg operates; and
>
> B. My experience and the experience of other Special Agents of the Drug Enforcement Administration has shown that individuals dealing in large quantities of narcotics are particularly covert in their activities and wary of surveillance by Federal and State law enforcement personnel. Such dealers very rarely keep records, deal personally with a very few trusted individuals and isolate themselves from other individuals in the distribution organization." Id. at 1130.

[4] The affidavit in the *Kalustian* case read as follows:

> "The informants named herein have all said that they will not testify to information they have provided, even if granted immunity . . .
>
> "Experience has further established that even though telephone toll records are available which indicate a person is engaged in illicit gambling, the records themselves are not sufficient to prove the gambling activities. Standard investigative techniques have not succeeded in providing evidence to sustain prosecution in this case and would only succeed to a limited degree in es-

in their activities, wary of surveillance, deal with a very few trusted individuals, and rarely keep records.[3]

Both these decisions are clearly at odds with the opinion of the Ninth Circuit in *United States v. Kalustian*, 529 F.2d 585 (1976), where the Court reversed the convictions of several gambling conspirators because the wiretap application had failed to comply with 18 U.S.C. §2518(1)(c) in that,

> "The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in nature or degree from any other gambling case. In effect, the Government's position is that all gambling conspiracies are tough to crack, so that Government need show only the probability that illegal gambling is afoot to justify electronic surveillance. Title III does not support that view." Id. at 589[4]

Petitioner contends that an examination of the affidavits in these cases reveal that the *Kalustian*[5] decision has expressly re-

tablishing that Kale Kalustian, also known as Kelly, Patrick Dale Pond, Otto Vincent Marino, Patrick Jackson, Bill Stempke and others as yet unknown, are involved in gambling activities over the telephone subscribed to in the name of the Topper Club. * * *

"Furthermore, such investigative techniques as physical surveillance and the records obtainable on Kale Kalustian, also known as Kelly, Patrick Dale Pond, Otto Vincent Marino, Patrick Jackson, Bill Stempke and others as yet unknown, contain little probability of success in securing presentable evidence. Based upon my knowledge and experience as a Special Agent of the Federal Bureau of Investigation in the investigation of gambling cases and my association with other Special Agents who have conducted investigation of gambling activities, normal investigative procedures appear to be unlikely to succeed in establishing that the above individuals are involved in gambling activities over the aforementioned telephones in violation of Federal laws. My experience and the experience of other Agents has shown that gambling raids and searches of gamblers and gambling establishments have not, in the past, resulted in the gathering of physical or other evidence to prove all elements of the offense. I have found through my experience and the experience of other Special Agents, who have worked on gambling cases, that gamblers frequently do not keep permanent records. If such records have been maintained, gamblers, immediately prior to or during a physical search, sometimes destroy the records. Additionally, records that have been seized in past gambling cases have generally not been sufficient to establish elements of Federal offenses because such records are difficult to interpret, and many times are of little or no significance without further knowledge of the gamblers' activities. Therefore, the interception of these telephone communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove violation of these statutes. * * *

"Wherefore, because of the existence of facts and underlying circumstances of the continuing investigation listed above in paragraphs 4 through 32b, I submit that the probable cause as submitted in paragraphs 3a, 3b and 3d exists; that the extensive normal investigative procedures tried, as set forth in paragraphs 4 through 32b, have failed to gather evidence necessary to sustain prosecution for violation of the offenses enumerated in paragraph 3a, and reasonably appear unlikely to succeed. * * *" Id. at 587-588.

[5] See also *United States v. Curreri*, 388 F.Supp. 607 (Md. 1974).

fused to accept as complying with 18 U.S.C. §2518(1)(c) that which the *Kirk* and *Steinberg* decisions have upheld. For in all of these affidavits, the underlying theme is that without electronic surveillance, it will be a difficult case to prove in Court. There are little or no other *facts* given to justify the acceptance of the application. The reasons referred to in the *Kirk* opinion are actually nothing more than conclusions with no supporting details.

Therefore, in light of the inconsistency of these various opinions, Petitioner respectfully requests that this Court grant this Petition so that there may be some definitive ruling as to what constitutes compliance with 18 U.S.C. § 2518(1)(c).

2. This Court must finally decide whether the requirements set forth in 18 U.S.C. § 2518(1)(c) and (3)(c) for wire tap applications and orders must be *strictly* or *substantially* complied with.

In affirming an order to suppress in *United States v. Giordano*, 416 U.S. 505, 527, 94 S.Ct. 1820, 1832, 40 L.Ed.2d 341 (1974), this Court stated,

> "[w]e think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially inplement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device."

And while in *United States v. Chavez*, 416 U.S. 562, 580, 94 S.Ct. 1849, 1858, this Court did not find that Title III required the suppression of the wiretap evidence in that case, the Court stated,

> "Though we deem this result to be the correct one under the suppression provisions of Title III we also deem it appropriate to suggest that strict adherence by the Government to

the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought."

Furthermore, each of the various Circuits of the United States Court of Appeals which has upheld the constitutionality of Title III has done so because of the stringent guidelines and requirements of the Act. See e.g. *United States v. Martinez*, 498 F.2d 464 (6th Cir. 1974) cert. den. 419 U.S. 1974; *United States v. Cox*, 449 F.2d 679 (10th Cir. 1971) cert. den. 406 U.S. 934; *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1972) cert. den. 417 U.S. 918.

However, when these same courts are faced with a suppression motion based on violation of 18 U.S.C. § 2518(1)(c) they abandon their previous language of stringent requirements and strict compliance and turn instead to "substantial compliance." *United States v. Armocida*, 515 F.2d 29 (3rd Cir. 1975); *United States v. Steinberg*, 525 F.2d 126 (2nd Cir. 1975), and reading § 2518(1) (c) in a "practical and commonsense fashion" *United States v. Cacace*, 529 F.2d 1167 (5th Cir. 1976) per curiam; *United States v. Brick*, 502 F.2d 219, (8th Cir. 1974).[6]

Unfortunately, none of the decisions have sought to define these terms of art. In fact, these decisions are normally similar to the opinion filed in this case where the Court sets forth the test to be used and then with rather conclusory, general statements, states that the test has been met. See *United States v. Kirk*, — F.2d — (8th Cir. 1976) at pgs. A-17-A-19 of attached opinion; *United States v. Robertson*, 504 F.2d 289 (5th Cir. 1974) cert. den. 421 U.S. 913 (1975); *United States v. Brick*,

[6] For a complete discussion, see *ELECTRONIC SURVEILLANCE, Title III and the Requirement of Necessity*, 2 Hastings Con. Law Qtly. 571 (1975).

supra; *United States v. Steinberg*, supra. Compare *United States v. Kalustian*, supra.

Therefore, Petitioner feels that it is mandatory that this Court establish uniform guidelines for establishing compliance with 18 U.S.C. § 2518(1)(c).

III. Whether the Trial Court erred in refusing to grant defendant's Motions for severance and in instructing on a single conspiracy when multiple conspiracies were indicated by the evidence.

1. The various Circuits of the United States Courts of Appeals are in conflict as to the existence of single or multiple conspiracies on the basis of evidence similar to that presented here.

In this case, the Government originally charged sixteen defendants, ten of which were tried in a joint trial of some twenty-two counts, including the conspiracy count. The trial lasted from March 25, 1975 through April 22, 1975. Prior to, during, and subsequent to trial motions for severance were made on behalf of each defendant. All such motions were denied.

On appeal to the Eighth Circuit, defendants claimed that the Trial Court had erred in refusing to grant these motions for severance and in refusing to instruct the jury as to multiple conspiracies. But the Court of Appeals found that there was substantial evidence from which the jury could find a single conspiracy among the defendants to purchase and distribute heroin in the St. Louis area, and therefore, there was no error in refusing to instruct on multiple conspiracies or in denying the motions for severance. In so doing, the Court of Appeals has held in a manner inconsistent with the decision of the Second Circuit in *United States v. Bertolotti*, 529 F.2d 149 (1976).

Prior to applying for a wiretap order, the Government agents in this case had used normal surveillance techniques and con-

sensual phone calls. These calls led to several purchases of narcotics by the Government informant from Eugene C. Kirk, Willie West Johnson, and Gregory L. Kirk. Furthermore, the calls and surveillance produced evidence which implicated Audrene Hill and Gwendolyn Williams.

However, the major portion of the Government's case, and by far the most prejudicial, consists of the intercepts of the two telephone lines at 6145 Lalite. As noted earlier, some 102 phone calls were introduced into evidence and with regard to some of the defendants, these calls were the only evidence that was presented against them.

For example, the evidence produced against the Petitioner consisted of four phone calls, three made by the Petitioner to Eugene Kirk allegedly regarding the purchase of heroin and one made by Kirk to an unknown male which allegedly refers to Petitioner, and testimony that Petitioner flew from St. Louis to New York and back again *without* any narcotics.

There is absolutely no proof that Petitioner knew or was aware of, much less that he was in agreement with, any of the other defendants in this case, except for Eugene Kirk. And even the finding of that agreement rests on many language interpretations and inferences.[7] Furthermore, there is absolutely no evidence that Petitioner ever purchased or transported any narcotics.

But this lack of any connection between Petitioner and any of the other defendants is not peculiar to Petitioner alone. Many of these defendants, against whom the Government presented mainly wiretap evidence, were not shown to be in any sort of

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[7] That is, an agent testified that he *thought* the voices on the line were those of Liddell Green and Eugene Kirk, and that he *thought* the words were "white boys" and that on the basis of his experience he *felt* that "white boys" referred to heroin.

agreement, expressly or otherwise, with any one but Kirk. Yet the Government insists on assuming that all of the defendants were part of a single, illegal business venture. The Court of Appeals adopted that view.

In *United States v. Bertolotti*, supra, the Second Circuit refused to accept this common element or "hub" as indication of a mass conspiracy. The Court noted that the Second Circuit had gone far in finding single conspiracies in narcotic cases,

> "Despite the existence of multiple groups within an alleged conspiracy, we have considered them as part of one integrated loose-knit combination in instances where there existed 'mutual dependence and assistance' among the spheres . . ., a common aim or purpose among the participants . . ., or a permissible inference, from the nature and scope of the operation; that each actor was aware of his part in a larger organization where others performed similar roles equally important to the success of the venture . . ." Id. at 154.

Still the Court recognized that neither association alone nor the presence of a common factor has ever been held a sufficient nexus for a finding of a single conspiracy.

Similarly, what evidence of mutual dependence, or common aim, or recognition of a larger organization is present here where the Petitioner talked to no one but Kirk and has not been shown to deal in any narcotics.

Petitioner feels that these two cases are inconsistent in regard to their interpretation of similar evidence to find single or multiple conspiracies. Petitioner would also like to point out that the *Bertolotti* decision thoroughly analyzed the issue of prejudice with regard to a variance between the indictment and proof. The Court held that the spill-over effect of the massive amount of evidence presented in a four-week trial was sufficiently prejudicial not only to those individuals who participated in one of the

smaller conspiracies, but also as to the central figures who had participated in all the illegal transactions.

Therefore, in light of the inconsistency of these decisions and the importance of this issue with regard to conspiracy trials, Petitioner respectfully requests that this Petition be granted.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted.

REQUEST TO JOIN IN THE PETITIONS OF THE OTHER DEFENDANTS

Petitioner, Liddell Green, has filed this Petition on behalf of himself and separate from the other defendants in this matter because this Petition was due at an earlier date. Petitioner Green understands that the other defendants will also be filing such petitions and would request that he be permitted to join in the arguments raised in those petitions with regard to these issues or any other issues that might be raised.

Respectfully submitted

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APPENDIX

United States Court of Appeals
For the Eighth Circuit

September Term, 1975

75-1359

The United States,
Appellee,

vs.

William Guy Hamilton,
Appellant.

75-1364

The United States,
Appellee,

vs.

Eddie Roberts,
Appellant.

75-1365

The United States,
Appellee,

vs.

Gregory L. Kirk,
Appellant.

75-1386

The United States,
Appellee,

vs.

Liddell Green,
Appellant.

75-1429

United States of America,
Appellee,

vs.

Audrene Hill, et al.,
Appellants.

75-1449

The United States,
Appellee,

vs.

Eugene C. Kirk, Sr.,
Appellant.

75-1542

United States,
Appellee,

vs.

Marvin Bonds,
Appellant.

Appeals from the United States District Court for the
Eastern District of Missouri

Motion of appellant in case No. 75-1386 to amend petition for rehearing has been considered by the Court and is hereby, granted.

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

May 17, 1976

United States Court of Appeals
For the Eighth Circuit

Nos. 75-1359, 75-1364, 75-1365, 75-1386,
75-1429, 75-1449 and 75-1542.

United States of America,
Appellee,

vs.

Eugene C. Kirk, Sr., Gregory L. Kirk, Audrene Hill, Deborah Barnett, William Guy Hamilton, Liddell Green, Caroline Kirk, Marvin Bonds, Eddie Roberts,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: February 11, 1976

Filed: April 22, 1976

Before Gibson, Chief Judge; Bright, Circuit Judge, and Van Pelt, Senior District Judge.*

Van Pelt, Senior District Judge.

The nine appellants herein were convicted by a jury of having conspired to distribute, and to possess with intent to distribute, heroin, in violation of 21 U.S.C. § 846. Each appellant was also convicted of one or more related substantive distribution offenses.[1] They now appeal from those convictions, con-

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* The Honorable Robert Van Pelt, United States Senior District Judge for the District of Nebraska, sitting by designation.

[1] Specifically, appellant Eugene C. Kirk, Sr., was convicted of four counts of having distributed, and possessed, with intent to distribute, heroin, in violation of 21 U.S.C. § 841(a)(1), of twelve

tending numerous errors were made by the trial court during their joint trial. We affirm on all issues raised in this appeal.

The issues presented are many:

1. Whether the evidence presented by the government established a single conspiracy as charged in the indictment or multiple conspiracies as the appellants contend.

2. Whether the evidence was sufficient to convict Audrene Hill, Deborah Barnett, Caroline Kirk, Liddell Green, Eddie Roberts and Marvin Bonds.

3. Whether the trial court erred in refusing to suppress recordings of telephone conversations between a government informant and one of the appellants where the informant did not testify at trial.

4. Whether the trial court erred in admitting recordings of telephone conversations among the appellants intercepted during a court authorized wiretap.

5. Whether the court prejudicially erred in allowing the jury to use transcripts of the recorded conversations prepared by the government as an aid in listening to the recordings played at trial, and in permitting identification testimony based on those recordings.

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counts of having used a telephone to facilitate a conspiracy to possess and distribute heroin, in violation of 21 U.S.C. § 843(b), and of one count of having engaged in a continuing criminal enterprise, in violation of 21 U.S.C. § 848. Appellant Gregory L. Kirk was convicted on one count of having distributed and possessed with intent to distribute heroin, in violation of 21 U.S.C. § 841(a)(1). Appellants Audrene Hill, Deborah Barnett, William Guy Hamilton, Liddell Green, Caroline Kirk, Marvin Bonds and Eddie Roberts were each convicted of one count of having used a telephone to facilitate a conspiracy to possess and distribute heroin, in violation of 21 U.S.C. § 843(b). The appellants received substantial sentences ranging from five years to forty years with additional special parole terms of three to eighteen years.

6. Whether 21 U.S.C. § 848 is unconstitutionally vague, and whether the evidence was sufficient to convict Eugene Kirk under that statute.

7. Whether the court erred in refusing to quash the jury panel on the grounds that it did not represent a cross section of the community.

8. Whether the court erred in instructing the jury regarding reasonable doubt, circumstantial evidence, acts and declarations of co-conspirators and membership in a conspiracy, and the failing to give offered instructions on voice identification and on the failure of the government to call a witness.

9. Whether the court erred in refusing to declare a mistrial because of prejudicial pre-trial publicity.

10. Whether the evidence seized at the two addresses involved in this case should have been suppressed because of insufficient probable cause for the search warrant.

11. Whether the appellants Kirk and Barnett were denied effective assistance of counsel and the right to be free on reasonable bail during the proceedings against them by the trial court's revocation of their bonds.

12. Whether the court erred in admitting testimony of government witnesses concerning the identification of certain substances as heroin and concerning the operation of certain tape recorders.

Between March 18, 1974, and June 18, 1974, undercover agents for the Drug Enforcement Administration (DEA) made four purchases of heroin from a James Nofles. The first of these transactions involved a black 1971 Mercury (license No. S9H-758) which was followed to a residence at 6145 Lalite in St. Louis. Later investigation revealed this was the home of Eugene Kirk, Sr. The remaining three transactions occurred in

and around the residence of Gwendolyn Williams at 4762 Northland.

The agents arrested Nofles on August 6, 1974. After his arrest, Nofles agreed to cooperate and assist the government investigation by arranging heroin purchases in telephone conversations to be recorded by the DEA agents.

From August 6, 1974, to September 4, 1974, Nofles made six telephone calls that were recorded by the agents. All the calls were made to two telephones located at 6145 Lalite. In the first call he negotiated with Deborah Barnett and Eugene Kirk for the purchase of a quantity of heroin. The remaining five calls resulted in purchases of heroin on four separate occasions. After arranging the purchase, Nofles was searched by DEA agents. The agents would then take him to the transaction site, provide the necessary funds, observe the purchase and collect the heroin Nofles had received.

The heroin was delivered to Nofles at a different place for each transaction. The first time Nofles went to the residence of Audrene Hill at 5707 Mimika and returned with a package of heroin. The second time Eugene Kirk delivered the heroin to a street location in St. Louis, arriving in the same black Mercury mentioned earlier. The third transaction involved delivery by Willie West Johnson, and the last delivery was made by Gregory Kirk, son of Eugene Kirk.

During this same period of time, Nofles asked Kirk if he could give his phone number to another buyer (DEA agent Roy Shurn). He was advised to give Shurn the telephone number of Willie West Johnson instead. Shurn had a couple of conversations involving heroin with Johnson following that time, but none was purchased.

On September 25, 1974, after receiving authorization from Attorney General William Saxbe pursuant to 18 U.S.C. § 2516, the government applied for a court order authorizing interception of wire communications on two telephones at 6145 Lalite. This order was granted and the intercept proceeded. During the twenty days the order was in effect, the agents intercepted 2918 phone conversations on the two phones, an average of 146 calls per day. The interceptions established the existence of heroin trafficking among the appellants and other individuals. The conversations disclosed numerous heroin transactions involving all appellants as well as the efforts of Eugene Kirk to make purchases of heroin in New York and California.

The wire interception terminated on October 15, 1974. However, there was one final phone call made by Nofles to Gwen Williams on October 24. This was recorded with his consent and a purchase of heroin was arranged. On October 28, 1974, search warrants were executed on the residence at 6145 Lalite and also at 5979 Summit (home of a James Nelson). A foil packet containing traces of heroin was found at the Lalite address, where Gregory Kirk and Deborah Barnett were arrested. The remaining appellants plus a number of other individuals were arrested subsequently. Further facts will be developed as the issues are discussed.

Single Conspiracy v. Multiple Conspiracy.

The appellants contend that the evidence presented in this case indicates at best a series of separate transactions involving heroin sales with Eugene Kirk as the "hub" and the other appellants merely participated in separate and isolated transactions. It is their contention that this evidence established only a series of multiple conspiracies, not the single conspiracy as the government contends.

The appellants are correct in their assessment of the problems encountered in mass conspiracy trials when a number of defendants are tried together, especially if the evidence presented does, in fact, fail to show the defendants were involved

in a single conspiracy. *See United States v. Kotteakos*, 328 U.S. 750 (1945); and *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). However, the evidence in this case was more than sufficient for the jury to find a single conspiracy among the appellants to purchase and distribute heroin in the St. Louis area. The court quite properly denied the appellants' motions concerning severance and the multiple-conspiracy instructions. Since there was substantial evidence of a single conspiracy, there was no need to instruct the jury as to multiple conspiracies, *United States v. Barrera*, 486 F.2d 333 (2d Cir.), *cert. denied*, 416 U.S. 940 (1973), nor was there an abuse of the trial court's discretion in the denial of the severance motions. *United States v. Hutchinson*, 488 F.2d 484 (8th Cir.), *cert. denied*, 417 U.S. 915 (1973).

As a normal rule, severance should be allowed upon a showing of real prejudice to an individual defendant, *United States v. Hutchinson*, 488 F.2d 484 (8th Cir. 1973); however, "in the absence of such a showing, persons charged in a conspiracy should be tried together, especially where the proof of the charges against the defendants is based upon the same evidence and the same acts." *Id.* at 492. The question of whether to sever the appellants' trials was in the sound discretion of the trial judge, *Fed. R. Crim. P.* 14, and based on the conspiracy evidence presented by the government that discretion was not abused.

A review of the evidence presented points out the weakness in the appellants' position. In addition to the activities brought to light through the use of the informant, Nofles, the involvement of the various appellants in the conspiracy was further developed by the wire interception. Looking at the evidence developed against each appellant separately, it becomes apparent that there was sufficient evidence of a conspiracy to submit the case to a jury.

Eugene Kirk was involved in almost all of the phone calls intercepted and played to the jury. The recorded conversations had him dealing with various distributors, including appellants Hill, Caroline Kirk, Hamilton, Bonds and Roberts. He negotiated for heroin purchases from other dealers in California, Renall Dudley and Anderson Young, and sent people from St. Louis to either purchase heroin or make further arrangements in California (Williams and Barnett) and in New York (Green). He was involved in distributing heroin by either personally delivering to Nofles, Hamilton and others, or having it delivered by Barnett and Gregory Kirk. He arranged deliveries between various distributors, such as between Caroline Kirk and Bonds, Caroline Kirk and Nelson, Bonds and Cranage and Hill and Thomas. From the evidence presented to the jury there can be no doubt that Eugene Kirk was the leader and organizer of the conspiracy. He performed the many functions of a leader and organizer from managing personnel to overseeing quality control. His part in the conspiracy is well established.

Deborah Barnett also played a major part in the distribution business. She assisted Kirk in working with his distributors by assisting them with their sales (Caroline Kirk). She arranged sales and made deliveries to Cranage and Hill. Her assistance was also used in attempting purchases in California through her trip to San Diego to meet with Anderson Young. She dealt with many problems in Kirk's absence such as quality control, dealing with dissatisfied buyers, and making deliveries to the distributors. Her importance to and involvement with the conspiracy cannot be questioned.

Gregory Kirk's involvement in the conspiracy was established by his involvement with the delivery of heroin to informant Nofles and agent Shurn on September 4. He was also recorded in a conversation with Barnett where it was quite obvious that he was requesting she bring heroin to him. His name was mentioned by Eugene Kirk and Marvin Bonds in a series of con-

versations as the person who was to pick up some heroin and marijuana from Bonds. Gregory was also arrested at the 6145 Lalite address at the time of the execution of the search warrant. These facts when viewed together present substantial evidence that Gregory Kirk knew of and participated in the conspiracy.

Audrene Hill's involvement as a distributor in Eugene Kirk's network was established at the trial through a number of recorded telephone conversations with Kirk and Barnett. During these conversations she discussed a customer who would try and contact Kirk. In other conversations Kirk checked her inventory of "buttons" or small capsules of heroin and gave her instructions on what was to be done with them. The informant, Nofles, purchased heroin at Hill's address after setting up the purchase with Eugene Kirk. Ms. Hill's participation in this case is apparent.

There was also substantial evidence presented whereby the jury could find that Caroline Kirk was heavily involved in the drug distribution network. Her phone number was given out by Barnett to a potential customer, as well as a customer who was unsatisfied with the quality of a former purchase. Ms. Kirk also had a series of conversations with Eugene Kirk wherein she was attempting to locate some heroin. He suggested she contact Marvin Bonds and James Nelson.

William Hamilton was recorded talking to Eugene Kirk about getting a quantity of "pee" and arranging its delivery. He and Kirk were observed by DEA agents a short time later at the location arranged in the phone conversation. On two subsequent occasions Hamilton again made arrangements to purchase heroin and have it delivered to a street location. This is more than sufficient evidence to establish his part in the conspiracy.

Liddell Green was shown to have been involved in Kirk's attempt to purchase heroin in New York. Green was observed

at Kirk's residence and proceeding directly to the St. Louis airport, where he took a flight to New York .He telephoned Kirk and asked about white heroin ("white boys"). He was advised by Kirk to watch out for "man made" and that white heroin was okay if it could be cut six or seven times. Another call by Kirk to another individual some days later discussed Green's call and his inexperience with white heroin. Again, there was sufficient evidence to establish involvement.

Eddie Roberts was established as being a part of the Kirk network through two telephone calls. In one of the calls they discussed a quantity of heroin Roberts had available and which Roberts agreed to bring to Kirk. The second conversation concerned an aborted trip by a Gwen Williams to San Francisco to purchase heroin from Renall Dudley. Williams was either robbed or pretended robbery and kept the money Kirk sent with her. The two men discussed the robbery and Williams' involvement and Kirk said that Roberts' "bank" was okay. These calls were made by Kirk to the phone at the address where Roberts was served with a subpoena to take a voice exemplar prior to trial. This was sufficient to establish contact and knowledge of the conspiracy.

Marvin Bonds was involved in a number of conversations linking him to the conspiracy. On one occasion Eugene Kirk telephoned Bonds and arranged to get a quantity of heroin and some marijuana. Sometime later the same day, Bonds called Kirk and indicated that he thought Buttons (Gregory Kirk) was going to pick up the drugs. There were two more calls during which Bonds agreed to deliver. During one of these conversations, Kirk told Bonds that it was part of the job to make such deliveries. There were additional calls concerning this transaction. In subsequent conversations, Bonds was instructed to deliver some heroin to Cranage. Cranage phoned Kirk and confirmed the delivery. Bonds' phone number was also given to Caroline Kirk when she was looking for a quantity of heroin.

There was more than sufficient evidence to link Bonds to the conspiracy.

The appellants complain of the prejudice involved in admitting into evidence the statements of the co-defendants. That such evidence is inadmissible hearsay and admitting it violates the rule of *Bruton v. United States*, 391 U.S. 123 (1968). However, the United States Supreme Court has recently stated:

> The hearsay rule does not automatically bar all out-of-court statements by a defendant in a criminal case. Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy. The same is true of declarations of coconspirators who are not defendants in the case on trial. *Dutton v. Evans*, 400 U.S. 74, 81 (1970). [*United States v. Nixon*, 418 U.S. 683, 701 (1974).]

Accord, United States v. Richardson, 477 F.2d 1280 (8th Cir.), *cert. denied*, 414 U.S. 843 (1973). Of course, "there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury." *Id.* at 701, n. 14.

This court has stated:

> Previous acts of a co-conspirator may be admissible against a defendant once a prima facie case of conspiracy is proved when such previous acts show the nature and objectives of the conspiracy. [*United States v. Morton*, 483 F.2d 573, 576 (8th Cir. 1973).]

It has also held:

> If a defendant's participation in a conspiracy has been established, then the defendant is culpable for everything said, written or done by any of the other conspirators in furtherance of the common purpose of the conspiracy. [*United States v. Overshon*, 494 F.2d 894, 896 (8th Cir.), *cert. denied*, 419 U.S. 853 (1974).]

Accord, United States v. Rich, 518 F.2d 980 (8th Cir. 1975). Viewing the evidence in the light most favorable to the jury verdict rendered, as we must do, *id.* at 984, *United States v. Overshon, supra* at 896, it is readily apparent that the government has established the existence of a single conspiracy in which the appellants not only took an active part, but also knew of the involvement of others. The evidence was sufficient to show a nexus between each appellant and the conspiracy. *See United States v. Hester*, 465 F.2d 1125 (8th Cir. 1972). There was "evidence that each was aware of others in the line of distribution and of the larger nature of the operation in which he * * * played a part," *United States v. Sperling, supra* at 1340, and that the "conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers." *United States v. Bynum*, 485 F.2d 490, 496 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1944).

The trial court was quite proper in not instructing the jury on multiple conspiracies. It also did not violate the *Bruton* rule by refusing to sever the cases and by allowing admission of the statements challenged by the appellants.

Sufficiency of the Evidence

A number of the appellants contend the evidence was insufficient to convict them of involvement in the conspiracy. Specifically these include Deborah Barnett, Caroline Kirk, Audrene Hill, Liddell Green, Eddie Roberts and Marvin Bonds. It is difficult to find any real merit to their contentions.

> Once the government has established the existence of a conspiracy, even slight evidence connecting a particular

> defendant to the conspiracy may be substantial and therefore sufficient proof of the defendant's involvement in the scheme. [*United States v. Overshon, supra* at 896.]

The evidence against each of the appellants was set forth above and further repetition is unnecessary. In addition to the above evidence, appellants Caroline Kirk and Eddie Roberts were also identified through the use of voice exemplars.

There was more than sufficient evidence for the jury to find all the appellants guilty of being involved in the conspiracy to distribute heroin in St. Louis.

The Consensual Recordings

It is well settled that a defendant's Fourth Amendment rights are not violated when the defendants conversations with a government informant are recorded with the consent of the informant. *United States v. Rich, supra* at 984-985; *United States v. McMillan,* 508 F.2d 101, 104 (8th Cir.), *cert. denied,* 421 U.S. 916 (1974). The appellants do not appear to contend otherwise.

However, they strongly contend that the government did not prove the informant's consent to these recorded conversations and the fact that Nofles was unavailable at trial is violative of due process. It is their contention that Nofles was coerced by the DEA agents and therefore his consent was not freely given. That due process and confrontation rights were violated when Nofles was not presented at trial so that he could be examined on the question of coerced consent.

In deciding on the voluntariness of Nofles' consent we must look at the totality of circumstances surrounding the events in question. *United States v. McMillan, supra* at 104, n.2. In *McMillan* this court cited with approval the Second Circuit's decision in *United States v. Bonnano,* 487 F.2d 654 (2d Cir. 1973), for the proposition that "it will normally suffice for the government to show that the informer went ahead with a call after knowing what the law enforcement officers were doing." *United States v. McMillan, supra* at 104, n.2. In this case Nofles knew what the agents were doing with the recording equipment and he went ahead with his telephone calls to Eugene Kirk.

Although such a showing is normally sufficient to establish consent, the appellants contend that this consent was coerced. Agent Reiff testified that Nofles was not threatened, coerced or promised immunity in exchange for his consent, but was only told that his cooperation would be made known to the prosecuting attorney. Consent has been found under lesser circumstances. In *United States v. Rich, supra* at 985, it was said:

> The fact that Walsh became a government informant in exchange for a promise of immunity from prosecution in no way diminishes the voluntariness of his "consent" to the monitoring of his conversations with the defendants and the other alleged conspirators.

Viewing the totality of circumstances surrounding the recording of Nofles' conversations with Kirk, it seems apparent that Nofles gave his consent freely in hopes that the prosecutor would take his cooperation into account when the prosecution began. According to the above cited cases, consent so given is to be considered voluntary. The government met its burden of proving the voluntariness of the informant's consent.

The appellants also contend that they were prejudiced by the loss of the testimony of an informant who was also allegedly involved in the drug distribution scheme. "The likelihood that the loss was prejudicial is eased by the reliability of the evidence presented by the government." **United States v. Norton,** 504

U.S. 342 (8th Cir. 1974), **cert. denied,** 419 U.S. 1113 (1975). The government's evidence concerning the transactions and conversations in which Nofles was involved was substantial and reliable. Balancing this evidence and the fact that prior to trial Nofles written statements were made available to the defense with the fact that it was impossible for Nofles to appear, this court cannot say that any of the appellants' rights were violated by admission of the recorded conversations.

The Court-Authorized Wire Interception

The appellants contend that the trial court erred in refusing to suppress the multitude of recorded conversations gained by the government through the use of the court-authorized wire interception. The contention is based on numerous theories, including the unconstitutionality of the "wiretap" statute, 18 U.S.C. § 2510, *et seq.*, lack of probable cause and staleness, failure to exhaust normal investigative procedures as well as other procedural defects. We find no merit in any of their positions.

The appellants' attack on the constitutionality of Title III of the Omnibus Crime Control Act of 1968, 18 U.S.C. §§ 2510-2520, meets overwhelming resistance in this circuit as well as every circuit that has faced the issue. Title III fully meets the constitutional requirements of the Fourth Amendment. **United States v. Cox,** 462 F.2d 1293 (8th Cir. 1972), **cert. denied,** 417 U.S. 918 (1974); **United States v. John,** 508 F.2d 1134 (8th Cir. 1975); **United States v. Tortorello,** 480 F.2d 764 (2d Cir.), **cert. denied,** 414 U.S. 866 (1973); **United States v. Cafero,** 473 F.2d 489 (3d Cir. 1973), **cert. denied,** 417 U.S. 918 (1974); **United States v. Bobo,** 477 F.2d 974 (4th Cir. 1973), **cert. denied,** 421 U.S. 909 (1974); **United States v. Sklaroff,** 506 F.2d 837 (5th Cir. 1975); **United States v. Martinez,** 498 F.2d 464 (6th Cir.), **cert. denied,** 419 U.S. 1056 (1974); **United States v. Ramsey,** 503 F.2d 524 (7th Cir. 1974), **cert. denied,** 420 U.S. 932 (1975); **United States v. Cox,** 449 F.2d 679 (10th Cir. 1971), **cert. denied,** 406 U.S. 934 (1972); **United States v. James,** 494 F.2d 1007 (D.C. Cir.), **cert. denied,** 419 U.S. 1020 (1974).

We have examined the application for the wire interception and the accompanying affidavit and find no support for the appellants' contention that there was a lack of probable cause to support granting the request.

The application for the wire interception must be viewed in a "commonsense way," **United States v. Ventresca,** 380 U.S. 102, 109 (1965), to determine if there were ample facts to establish probable cause to grant the wire interception request. "[I]n judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense * * *." **Spinelli v. United States,** 393 U.S. 410, 419 (1969); **United States v. Kleve,** 465 F.2d 187, 193 (8th Cir. 1972).

The five-page application in this case was supported by a ten-page affidavit of DEA agent Reiff. It was a detailed statement of the facts known to the agent at that time, including the involvement of informant Nofles, the conversations with Kirk and Johnson, the deliveries by Gregory Kirk and Eugene Kirk, as well as automobile license registrations, telephone records, addresses, etc., of the known parties involved. If all applications for search warrants were this complete, similar probable cause issues would soon disappear from appellate court dockets.

The appellants' position concerning staleness of the application is also without merit. The proposition that "* * * the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *Sgro v. United Staets,* 287 U.S. 206, 210 (1932), is, of course, true. However, "probable cause is not determined by merely counting the number of days between the time of the

facts relied upon and the warrant's issuance." *United States v. Rahn*, 511 F.2d 290, 292 (10th Cir. 1975). Other factors are to be considered, including "the nature of the criminal activity involved * * *." *United States v. Steeves*, 525 F.2d 33, 38 (8th Cir. 1975). The twenty-one day time lapse between the date of the last information contained in the application and the issuance of the wire interception order does not proscribe a finding of probable cause in this instance. The activity involved was a continuing criminal conspiracy to distribute heroin, and the affidavit supporting the application so stated. Under such conditions, "time is of less significance." *Bastida v. Henderson*, 487 F.2d 860, 864 (5th Cir. 1973). Probable cause was not eliminated by the twenty-one day delay.

The statute involved here, 18 U.S.C. § 2518(1)(c), requires that the application for an order authorizing wire interception set forth "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous * * *." This requirement is to be reasonably construed and the application tested in a "commonsense fashion." *United States v. Brick*, 502 F.2d 219, 224, n.14 (8th Cir. 1974). Viewing the instant application and affidavit in this light, it is quite obvious that the statutory requirements were met. Agent Reiff's affidavit states in detail the reasons that normal investigative techniques had not been successful in determining the extent of the heroin operation. These reasons included inability to determine who lived with Kirk at the 6145 Lalite Avenue address, and who else was involved in his operation from the source to the retail market. The affidavit states the danger of being discovered if normal surveillance techniques were continued as a sole means of investigation. This court cannot read the above statute to require more of the government than was done in this case.

The government also exceeded the requirements of the statute in naming the person whose communications were to be intercepted. All that 18 U.S.C. § 2518(1)(b) requires is that the application contain a full and complete statement of the facts, including details as to the particular offense being committed, a particular description of the nature and location of the facilities where the communication is to be intercepted, a particular description of the type of communications to be intercepted and the identity of the person, if known, committing the offense and whose communications are to be intercepted. There can be little doubt that the purpose of this subsection is to "link up specific person, specific offense, and specific place." S. Rep. No. 1097, 90th Cong. 2d Sess. 1968. There is no broad naming requirement in the statute. The government is not required to name every person who might be recorded in the wire interception. Therefore, the fact that some of the appellants (mainly, Deborah Barnett) were not named in the application does not mean that the authorization order was invalid. The application named all the individuals whom the government had probable cause to suspect would be involved in telephone conversations with the principal, Eugene Kirk. To require a broader naming requirement would improperly expand the statute and absent probable cause to support every name included, would most likely cause the application to be suject to denial or the evidence gathered therefrom subject to suppression. *See United States v. Tortorello*, 480 F.2d 764, 775 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973).

The Attorney General's approval or that of any Assistant Attorney General specially designated by him is required by 18 U.S.C. § 2516 before any application can be made for a wire interception. However, contrary to the appellants' assertion, the trial court did not have to hold an evidentiary hearing to determine the authenticity of Attorney General Saxbe's signature on the approval memorandum. There is nothing in the statute or in the cases dealing with the Attorney General's approval that requires a formula finding of authenticity. The cases that have dealt with related issues have involved either approval by persons

not authorized under the statute, *United States v. Giordano*, 416 U.S. 505 (1974), or misidentification of the authroizing official in the order authorizing interception, *United States v. Chavez*, 416 U.S. 562 (1974). *See United States v. Quintana*, 508 F.2d 867 (8th Cir. 1975). Neither of these situations is present here. The order authorizing the interception properly identifies William Saxbe as the proper official and the application contained a memorandum signed by William Saxbe, Attorney General, authorizing the application.

The appellants contend that there is no presumption of regularity with respect to the performance of the Justice Department. However, there is nothing in the statute or the cases cited above that support such a position. When the memorandum authorizing the application contains the heading "TO: Assistant Attorney General * * * FROM: The Attorney General" and contains the signature "William Saxbe," it seems apparent that the government has made a prima facie showing of the memorandum's authenticity. Absent further showing of impropriety by the appellants, this court cannot hold the authorization invalid when it is plainly sufficient on its face.

We must also disagree with the appellants on the issue of minimization. As this court has said recently in *United States v. Quintana*, 508 F.2d, *supra*, there are a number of factors to consider in determining whether the government has done all it could to avoid unnecessary intrusion. The major factors include the nature and scope of the criminal enterprise under investigation, the government's reasonable expectation of the contents of particular calls, and whether the interception is subject to the authorizing judge's continuing supervision. *Id.* at 874-875.

All of the important factors were present in the instant case. The criminal enterprise under investigation was a large narcotics conspiracy and the basic purpose of the wiretap was to learn the identity of the many conspirators and to determine the scope

of the operation. The government's reasonable expectation of the contents of the calls was that the parties to the conversations would be discussing the buying and selling of heroin.[2] It was not unreasonable to monitor all the calls for a time to determine which calls were connected to the conspiracy and which were not.[3] Finally, the authorizing judge continued to supervise the interception through receipt of reports on the fifth, tenth and fifteenth days following the authorization order.

The wire interception was handled properly and reasonably in this case and the appellants have failed to show otherwise.

The Transcripts

The appellants also appeal from the trial court's decision to allow the government to supply the jury transcripts that coincided with the recordings being played. The transcripts were not introduced into evidence and were in the possession of the jury only at the specific times the tapes were being played.

The appellants contend that the use of transcripts was prejudicial, that the opinions of the agents identifying the voices on the tapes were not supported by proper foundation, and the tapes were very poor recordings containing heavy dialects which made them extremely unreliable.

This court's decision in *United States v. McMillan*, 508 F.2d 101 (8th Cir. 1974), provides procedures by which we can judge the trial court's decision in this case. The court said:

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[2] The sophisticated code used by the persons involved in a narcotics conspiracy presents a unique problem because it is difficult to distinguish at the initial hearing which is innocent and which is relevant to the investigation. *United States v. Quintana*, 508 F.2d 867, 874, n.6 (8th Cir. 1975), and cases cited therein.

[3] The agents did in fact minimize approximately 130 calls.

The best evidence of the conversation is the tape itself; the transcript should normally be used only after the defendant has had an opportunity to verify its accuracy and then only to assist the jury as it listens to the tape. If accuracy remains an issue, a foundation may first be laid by having the person who prepared the transcripts testify that he has listened to the recordings and accurately transcribed their contents * * *. Because the need for transcripts is generally caused by two circumstances, inaudibility of portions of the tape under the circumstances in which it will be replayed or the need to identify the speakers, * * * it may be appropriate, in the sound discretion of the trial judge, to furnish the jurors with copies of a transcript to assist them in listening to the tapes. In the ordinary case this will not be prejudicially cumulative * * *. Transcripts should not ordinarily be read to the jury or given independent weight. The trial judge should carefully instruct the jury that differences in meaning may be caused by such factors as the inflection in a speaker's voice or inaccuracies in the transcript and that they should, therefore, rely on what they hear rather than on what they read when there is a difference * * *. [*Id.* at 105-6.]

The procedures set forth above were followed during the trial. The transcripts were not admitted into evidence and the appellants had an opportunity to verify their accuracy before they were used by the jury as it listened to the tapes. The agents who prepared the transcripts sufficiently testified as to their truth and accuracy. In addition, the trial court carefully instructed the jury on at least ten occasions throughout the trial and again at the end. Every time the instructions contained a statement cautioning the jury to remember that the tape was the best evidence, the transcripts were merely an aid, and if there was any difference it was to be resolved in favor of what was heard. Such a procedure was completely in accordance with the procedures approved in *McMillan* and we approve of them in this case.

The appellants make much of the fact that the tapes are difficult to hear and understand because of the heavy dialect, background noises and poor quality of the recording. As requested, the court has listened to virtually all of the tapes played for the jury and it cannot agree with the appellants. The tapes are difficult to understand in some instances because of background noise and the quality of the recording. It is also true that the heavy dialect is difficult to follow at first. However, once the ear is attuned and the listener becomes familiar with the dialect and inflections, the tapes are not incapable of comprehension and the relevant conversations which were transcribed become clearly understandable. Surely the jury would also be capable of understanding the recordings and making distinctions between the recorded conversations and the transcribed ones, if there were any.

Closely related to this issue is the question of proper identification of the voices heard on the tapes. The appellants feel that since the agents who identified the voices were not experts in voice identification and no electronic analysis or comparisons were made of the tapes, the testimony concerning identifications should have been suppressed.

Voice identification is not a subject of expert testimony. See *Federal Rules of Evidence* 901, note to subdivision (b), example 5. "The standards for the admissibility of an opinion as to the identity of a speaker is merely that the identifier has heard the voice of the alleged speaker at any time." *United States v. McMillan, supra* at 105, citing *United States v. Rizzo,* 492 F.2d 443 (2d Cir.), *cert. denied,* 417 U.S. 944 (1974); *Federal Rules of Evidence* 901(b)(5); *McCormick, Evidence* § 226 at 553-555 (Cleary ed. 1972). The voice identifications in this case all met this standard.

Voice exemplars were taken of Caroline Kirk, Eddie Roberts and Beverly Bonds (Marvin Bonds' wife) and compared by the agents to the voices on the intercepted tapes. This comparison provides further support to the agents' capabilities to identify the various speakers.

The credibility and accuracy of the agents' identification was further enhanced by Marvin Bonds. His testimony supported the government's identification of Kirk and Beverly Bonds in the series of conversations involving the three of them. Still further support was received from connecting telephone numbers, addresses and names or nicknames mentioned in the recordings. All these facts added together were sufficient cumulative evidence to submit the agents' identification testimony to the jury. It was therefore for the jury to determine whether the evidence was sufficiently credible to support the agents' identification of the voices heard.

The proper safeguards were provided in the trial and the trial court did not abuse its discretion in allowing the use of the transcripts to assist the jury or in permitting the agents to testify as to the identification of the various speakers.

Vagueness of 21 U.S.C. § 848

21 U.S.C. § 848 provides imprisonment or fine for any person who engages in a continuing criminal enterprise which is defined as any felony violation of the Drug Abuse statutes which is undertaken in concert with five or more persons of which such person is the manager or organizer and from which he obtains substantial income or resources.

Eugene Kirk claims that this statute is unconstitutionally vague and there was insufficient evidence to convict him under it even if constitutional.

The courts that have considered this question have ruled in favor of constitutionality. *See United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States v. Sisca*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States v. Collier*, 493 F.2d 327 (6th Cir.), *cert. denied*, 419 U.S. 831 (1974). We follow these authorities.

It is well settled that "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975). Whenever the statutory "language conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices," the statute passes constitutional muster. *Jordan v. DeGeorge*, 341 U.S. 223, 231-232 (1951).

The statute defines a "continuing criminal enterprise" in terms of specified violations, committed by a person who "occupies a position of organizer," which results in "substantial income or resources." The conduct reached, therefore, is only that which the violator knows is wrongful and contrary to law, *United States v. Manfredi, supra* at 602, and "where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from a lack of warning or knowledge that the act which he does is a violation of the law." *Screws v. United States*, 325 U.S. 91, 102 (1945). Prerequisite to conviction under Section 848 is the commission of a series of felonies, each involving specific intent. Kirk cannot argue that he did not know his conduct was criminal. *See United States v. Manfredi, supra.*

There was overwhelming evidence at trial establishing Kirk as the leader of a large and active narcotics distribution con-

spiracy. During the twenty days of the wire interception he received and made an incredible number of calls involving suppliers, distributors and buyers. The evidence established that Kirk dealt in large quantities of heroin and dealt with sufficient money to be able to send agents to New York and California to buy heroin. It was quite obvious that the work occupied Kirk on a more than full time basis, apparently for a number of years. There was sufficient evidence for the jury to convict Kirk of "continuing criminal enterprise" from which he received "substantial income or resources."

The Jury Selection Plan

The appellants contend that the jury selection plan in force in the Eastern District of Missouri violates the Sixth Amendment because it compiles the list of potential jurors from voting lists after each presidential election, thereby excluding from service those persons who reach voting age during the interim. It is also contended that the plan fails to prescribe an alternative source for the selection of additional names, as required by the provisions of the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.*

This court has held similar arguments to be without merit: "persons aged eighteen to twenty are not an identifiable group the exclusion of which renders a jury list non-representative of the community and violative of the Fifth and Sixth Amendments." *United States v. Olson*, 473 F.2d 686, 688 (8th Cir.), *cert. denied*, 412 U.S. 905 (1973). Additionally, the United States Supreme Court specifically rejected an identical claim in *Hamling v. United States*, 418 U.S. 87, 138 (1974), stating that "some play in the joints of the jury-selection process is necessary in order to accommodate the practical problems of judicial administration."

An alternative source of additional names is not required by the jury selection statutes except to carry out the purposes of the

Act. 28 U.S.C. § 1863(b)(2) In the instant case we are not faced with a violation of these purposes. The specified purposes include a jury selected at random from a fair cross section of the community, without discrimination on account of race, color, religion, sex, national origin or economic status. 28 U.S.C. §§ 1861, 1862. The exclusion of persons age eighteen to twenty-one does not render a jury list nonrepresentative of the community and does not violate the purposes of the Act. *Hamling v. United States, supra; United States v. Olson, supra.* Therefore, an alternative source is not required. *See United States v. Freeman*, 514 F.2d 171 (8th Cir. 1975), and cases cited therein.

The Jury Instructions

Appellants find fault with a number of the instructions given by the trial judge. Evaluating each separately, we find little merit in their position.

The instruction given by the trial court defining reasonable doubt did not constitute reversible error. The appellants assert that the sentence in the court's instruction which stated "It is not required that the government prove guil. beyond all possible doubt[.]" is error. However, this court has expressly held that such language is not improper. *United States v. Stead*, 422 F.2d 183 (8th Cir.), *cert. denied*, 397 U.S. 1080 (1970); *Friedman v. United States*, 381 F.2d 155 (8th Cir. 1967).

It is also asserted that the instruction defined reasonable doubt as proof that would make a person willing to rely or act, rather than as proof which would make a person hesitate to act. The appellants take a mistaken view of the instruction. The court specifically stated that it was the kind of doubt "that would make a reasonable person hesitate to act." Even if further statements appeared, in a limited extent, to change it to "willing to rely," it is still not reversible error. While it has been stated that

reasonable doubt is best defined in terms of hesitation, this court has clearly held that the giving of an instruction worded in terms of willingness to act—particularly if coupled with one expressed in terms of hesitation to act—is not reversible error. *United States v. Dixon*, 507 F.2d 683 (8th Cir. 1974); *United States v. Williams*, 505 F.2d 947 (8th Cir. 1974); *United States v. Dunmore*, 446 F.2d 1214 (8th Cir. 1971), *cert. denied*, 404 U.S. 1041 (1972); *see Holland v. United States*, 348 U.S. 121 (1954). When viewed as a whole, it is clear that the instructions adequately conveyed the concept of reasonable doubt to the jury.

The instructions concerning circumstantial evidence were substantially the same as that given in ***Devitt and Blackmar, Federal Jury Practice and Instructions***, § 11.02 (2d ed. 1970), and were proper. The instructions requested by the appellants stated "[y]ou should not find the defendant guilty unless the facts and circumstances proved are consistent with each other and the guilt of the defendant, and inconsistent with any reasonable theory of his innocence." This court has consistently held that a defendant is not entitled to an instruction that circumstantial evidence must exclude every reasonable hypothesis other than guilt, when a proper reasonable doubt instruction is given. Such instructions are confusing and incorrect. *United States v. Pugh*, 509 F.2d 766 (8th Cir. 1975); *United States v. Fryer*, 419 F.2d 1346 (8th Cir.), *cert. denied*, 397 U.S. 1055 (1970); *see Holland v. United States, supra.*

The appellants assert that two of the instructions concerning conspiracy and the acts and declarations of co-conspirators were unduly repetitious, confusing and therefore prejudicial. Conspiracy and the existence thereof was the major issue at trial. The majority of the evidence involved acts and declarations of the co-conspirators. If the trial court would have limited the instructions to the two paragraphs the appellants say were proper, the court would have been ignoring its function to completely instruct the jury. Considering the magnitude of this case, we do not believe the instructions were excessively lengthy. Even if they were, length and magnitude in a charge are not necessarily improper, and do not constitute reversible error in the absence of a showing of prejudice. *United States v. McCraken*, 488 F.2d 406 (5th Cir. 1974); *United States v. Birnbaum*, 373 F.2d 250 (2d Cir.), *cert. denied*, 389 U.S. 837 (1967).

The court's instruction that "[e]ven a single act may be enough to draw a defendant with the ambit of a conspiracy, where it is established that deefndant knew of the conspiracy and associated himself with it" was a correct statement of the law and was not improper. *See United States v. Hester*, 465 F.2d 1125 (8th Cir. 1972). This is especially true in light of the court's additional instruction that the act must be done knowingly and intentionally and the defendant's specific intent proved beyond a reasonable doubt.

The appellants' contention that the refusal of the trial court to give either of the two instructions offered concerning identification testimony borders on frivolity. The appellants contend that the two alternative instructions they offered were midifications of the standard forms provided in *Federal Jury Practice and Instructions, supra*, §§ 11.32 and 11.32A. They were more than mere modifications of those standard instructions. It was definitely not an abuse of discretion for the court to refuse. The instruction given by the court was virtually identical to the standard instruction shown in Section 11.32A and was most complete. *See United States v. Inge*, 494 F.2d 1102 (D.C. Cir. 1974).

Appellants' final contention regarding jury instructions is that the trial court erred in refusing to give an absent witness instruction permitting the jury to infer from the government's failure to produce three named witnesses that their testimony

would be unfavorable to the government. The propriety of such an instruction is largely within the discretion of the trial court. *United States v. Williams*, 481 F.2d 735 (8th Cir.), *cert. denied*, 414 U.S. 1026 (1973). In view of the fact that appellants made no adequate showing that the government possessed the sole power to produce these witnesses, and did not, in any event, make any timely request that these witnesses be produced, it is clear that the trial court did not err in refusing to give the requested instruction. *Walker v. United States*, 489 F.2d 714 (8th Cir.), *cert. denied*, 416 U.S. 990 (197).

The Pre-Trial Publicity

A review of the record establishes that there was no prejudicial pre-trial publicity as contended by the appellants. The jury was extensively questioned on the issue of publicity, and was admonished frequently by the court not to "read, see, hear or listen to any report from the news media in any way, shape, form or fashion" and to ignore anything that might accidently be seen.

The appellants have the burden of showing any essential unfairness in the adjudicatory process unless the totality of the circumstances raises the probability of prejudice. *United States v. McNally*, 485 F. 2d 398 (8th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974). It is clearly apparent that they cannot do so here, and the trial court did not err in refusing to declare a mistrial. *See United States v. Delay*, 500 F.2d 1360 (8th Cir. 1974).

The Seizure of Evidence

The appellants' contention that the evidence seized during searches at 6145 Lalite and 5979 Summit was seized under an invalid search warrant is also without merit.

The ten-page affidavit set forth in great detail the evidence the DEA agents had developed during the investigation, including the purchases by Nofles, the recorded telephone conversations plus additional corrobative evidence. In view of this overwhelming evidence, which showed a continuing heroin distribution operation in the Lalite residence, and involving the Summit residence, there was clearly probable cause for the issuance of the search warrant less than two weeks after the termination of the wire interceptions. The affidavit needed only to "establish the probability of criminal activity and secreting of evidence on specific premises, not proof beyond a reasonable doubt." *United States, v. Smith*, 462 F.2d 456 (8th Cir. 1972); *United States v. Harris*, 403 U.S. 573 (1971); *Spinelli v. United States*, 393 U.S. 410 (1959). The affidavit in this case more than met those standards.

The Revocation of Bonds for Kirk and Barnett

A review of the record in the bail revocation hearing establishes that the trial court had ample ground to revoke the bonds of Kirk and Barnett. A trial court has the inherent power to confine defendants to protect witnesses and to prevent defendants from tampering with the witnesses. *United States v. Cozzetti*, 441 F.2d 344 (9th Cir. 1971). It is also clear that there is no absolute right to release on bail prior to or during trial. *United States v. Smith*, 444 F.2d 61 (8th Cir. 1971).

Based on substantial evidence introduced in the revocation hearing, the trial court had ample grounds for believing that Kirk and Barnett were involved in the deaths of three witnesses prior to trial. It was well within its discretion to revoke the bonds.

The appellants allege that the revocation denied them effective counsel. However, they cite no specific instances of preju-

dice except for the inconvenience caused their attorneys of traveling thirty or so miles to communicate with their client. This is not an unconstitutional denial of effective counsel.

The Identification of Heroin Exhibits

There is no indication in the record that the government chemists used anything other than the standard tests in analyzing and identifying the suspected heroin. The appellants' contention that the trial court should have made a determination concerning the general acceptance in the scientific community of such identifications is without merit. *See United States v. Nelson*, 499 F.2d 965 (8th Cir. 1974); *Moreno v. United States*, 391 F.2d 280 (5th Cir. 1968), and the contention that foundation should have been provided as to the scientific principle utilized in tape recorders and the reliability and general scientific acceptance of such machines is frivolous.

The trial court is affirmed as to all errors assigned.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Nos. 75-1838, 75-6957 and 75-7001

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In the Supreme Court of the United States

OCTOBER TERM, 1976

LIDDELL GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

AUDRENE HILL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

EUGENE C. KIRK, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 75-1838 App. A) is reported at 534 F. 2d 1262.

QUESTIONS PRESENTED

1. Whether the evidence at trial established the existence of multiple conspiracies or the single conspiracy charged in the indictment.

2. Whether evidence of recorded telephone conversations between certain petitioners and a government informant should have been excluded because the informant was not available to testify.

3. Whether the application for the wire interception order in this case sufficiently established that other investigative procedures were inadequate.

4. Whether the application for the intercept order should have identified petitioner Barnett as one whose conversations were to be intercepted.

5. Whether the trial court abused its discretion in allowing the jury to use transcripts while listening to the recorded conversations at trial.

6. Whether the continuing criminal enterprise statute, 21 U.S.C. 848, is unconstitutionally vague.

7. Whether the jury selection plan of the Eastern District of Missouri is improper because it compiles the names of potential jurors from voting lists at four-year intervals.

8. Whether the court erred in admitting the expert testimony of government chemists who identified certain substances as heroin.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, each of the nine petitioners was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846. In addition, each

petitioner was convicted of one or more related substantive offenses. Petitioner Eugene C. Kirk was convicted of four counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1); twelve counts of using a telephone to facilitate a conspiracy to distribute heroin, in violation of 21 U.S.C. 843(b); and one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. Petitioner Gregory L. Kirk was convicted of one count of distributing heroin, in violation of 21 U.S.C. 841(a)(1). Petitioners Audrene Hill, Deborah Barnett, William Guy Hamilton, Liddell Green, Caroline Kirk, Marvin Bonds and Eddie Roberts were each convicted of one count of using a telephone to facilitate a conspiracy to distribute heroin, in violation of 21 U.S.C. 843(b).[1]

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[1]Eugene C. Kirk was sentenced to eight years' imprisonment to be followed by a special parole term of three years on the conspiracy count and to consecutive sentences of the same length on each of the four substantive distribution counts, for a total of 40 years' imprisonment and 15 years' special parole. This sentence is to be served concurrently with a 40-year term imposed for the violation of 21 U.S.C. 848, and with 12 consecutive two-year sentences imposed for the substantive counts involving use of a telephone to facilitate the conspiracy. Petitioner Gregory Kirk was sentenced to a term of ten years' imprisonment and three years' special parole on the conspiracy count, to be served concurrently with a sentence of ten years' imprisonment on the substantive count on which he was convicted. The other petitioners received two-year sentences on the substantive counts on which they were convicted, to be served concurrently with their sentences on the conspiracy count. On that count, petitioner Hamilton was sentenced to a term of 15 years' imprisonment to be followed by six years of special parole, petitioner Barnett received a ten-year term of imprisonment and six years of special parole, petitioners Roberts and Green received ten-year terms of imprisonment and three years of special parole, petitioner Hill received an eight-year term of imprisonment and six years of special parole, petitioner Bonds received an eight-year term of imprisonment and three years of special parole, and petitioner Caroline Kirk received a five-year term of imprisonment and four years of special parole.

The evidence, which is summarized in the opinion of the court of appeals (Pet. No. 75-1838 App. A-5 to A-7, A-8 to A-12) established that petitioner Eugene C. Kirk headed a large heroin trafficking enterprise in St. Louis, Missouri, in which the other petitioners were participants.

Between March 18, 1974, and June 18, 1974, undercover agents of the Drug Enforcement Administration (DEA) made four purchases of heroin from James Nofles. In the first of these transactions, the heroin was delivered to Nofles by a person who was subsequently followed to the residence of petitioner Eugene Kirk (Tr. 266, 399-400). The next three transactions occurred in and around the residence of co-defendant Gwendolyn Williams (Tr. 279-289, 472-473, 1839).

On August 6, 1974, Nofles was arrested by DEA agents (Tr. 181). After his arrest, Nofles agreed to assist the government investigation by arranging heroin purchases in telephone conversations which would be recorded by the agents (Tr. 182, 189-190, 197). Subsequent recorded telephone calls from Nofles to Eugene Kirk led to four separate purchases of heroin. In the first of these transactions, Nofles picked up the heroin at the residence of petitioner Hill (Tr. 198, 206, 231-232, 407-409, 1840). In the three subsequent transactions, the heroin was delivered to Nofles by petitioner Eugene Kirk, petitioner Gregory Kirk, and co-defendant Willie Johnson (Tr. 247-252, 261-265, 296-298, 306, 316-318, 414-416, 421-425, 454-459). After one of these transactions Nofles attempted to arrange a sale directly between Eugene Kirk and a DEA undercover agent. Kirk refused to deal directly, however, requiring that the undercover agent deal with co-defendant Willie Johnson (Tr. 426-430; Ex. 19).[2]

[2]"Ex." refers to the tapes and the transcripts of them.

When contacted by the DEA agent, Johnson indicated that he was a "deliverer" and that he had been with his source (Eugene Kirk) for ten years (Ex. 21).

On September 25, 1974, a court-authorized wire interception was instituted on two telephones at the residence of Eugene Kirk. Approximately 100 of the conversations recorded during the intercept were introduced into evidence at trial. These conversations, in some instances corroborated by surveillance testimony of DEA agents, disclosed numerous interconnected heroin transactions involving all petitioners and other co-conspirators. In addition to many local transactions, the conversations established that Eugene Kirk conducted negotiations with sources in San Francisco and San Diego, that he collected money from other conspirators (including petitioner Roberts) to achieve bulk purchases, and that he sent "runners" (including petitioners Barnett and Green) to California and New York to make the heroin purchases (Exs. 33-34, 36-38, 40-41, 43, 46-47, 50-53, 75, 79-82, 92, 97, 101-104, 108-115, 118, 120, 135, 144-145, 148, 151, 156, 164, 168, 172, 174A, 188, 189A, 191A; Tr. 1670-1671, 1853-1857, 1869-1883, 1945-1948).

ARGUMENT

1. Petitioners contend that the evidence at trial did not establish the existence of the single conspiracy charged in the indictment, but showed only a series of smaller conspiracies involving separate and isolated heroin sales between Eugene Kirk and the other alleged conspirators (Pet. No. 75-1838, pp. 17-20; Pet. No. 75-6957, pp. 4-8; Pet. No. 75-7001, pp. 19-22).

This claim was properly rejected by the court of appeals (Pet. No. 75-1838 App. A-7 to A-13). Not only was there evidence that various conspirators pooled their funds to make bulk purchases of heroin and sent out buyers to

make these joint purchases in New York and California (see p. 5, *supra*), but there was also a significant degree of interdependence between the conspirators in their local transactions. For example, if a distributor telephoned Eugene Kirk or Barnett seeking heroin, they would refer him to other distributors in the conspiracy on those occasions when they were unable to supply the heroin themselves (Exs. 85, 195-197).

Although some of the co-conspirators may not have known each other, each worked as part of a continuing unified enterprise with common goals. As the court of appeals found (Pet. No. 75-1838 App. A-13):

> The evidence was sufficient to show a nexus between each appellant and the conspiracy. * * * There was "evidence that each was aware of others in the line of distribution and of the larger nature of the operation in which he * * * played a part," * * * and that the "conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers." [Citations omitted.]

Accordingly, there was ample evidence to establish the existence of a single continuing conspiracy among petitioners to purchase and distribute heroin in St. Louis, as was alleged in the indictment. See *Blumenthal* v. *United States*, 332 U.S. 539; *Braverman* v. *United States*, 317 U.S. 49; *United States* v. *Mayes*, 512 F. 2d 637, 642-643 (C.A. 6), certiorari denied, 422 U.S. 1008.[3] There was

[3]There is no conflict between the instant case and *United States* v. *Bertolotti*, 529 F. 2d 149 (C.A. 2). The *Bertolotti* court found that the specific evidence in that case did not establish a single conspiracy. In *Bertolotti*, unlike the instant case, there was evidence not of a continuing relationship between the alleged co-conspirators, but rather of four unrelated narcotics transactions in which the sole connecting factor was the presence of two particular individuals in each of the transactions. *United States* v. *Sperling*, 506 F. 2d 1323, 1340 (C.A. 2), certiorari denied, 420 U.S. 962, quoted by petitioners (Pet. No. 75-6957, pp. 6-7), held that the evidence there established a single conspiracy; *Sperling* was one of the cases relied upon by the court below (Pet. No. 75-1838 App. A-13).

therefore no need to instruct the jury as to multiple conspiracies. *United States* v. *Barrera*, 486 F. 2d 333 (C.A. 2), certiorari denied, 416 U.S. 940. Nor did the district court abuse its discretion in denying petitioners' severance motions. *United States* v. *Hutchinson*, 488 F. 2d 484 (C.A. 8), certiorari denied, 417 U.S. 915.[4]

2. Petitioners contend (Pet. No. 75-7001, pp. 23-26) that recordings of telephone conversations of Nofles, the government informant, should have been suppressed because Nofles, who was killed shortly after petitioners' arrest (Tr. February 12, 1975, p. 33), was not available to testify regarding his consent to the recording of the conversation. Only petitioners Eugene Kirk and Barnett have standing to raise this issue, since only their conversations with Nofles were recorded. See *Alderman* v. *United States*, 394 U.S. 165; *Brown* v. *United States*, 411 U.S. 223.

[4]Petitioners (Pet. No. 75-6957, p. 7; Pet. No. 75-7001, pp. 21-22), relying on *Bruton* v. *United States*, 391 U.S. 123, also argue that the trial judge erred in admitting the statements of their co-defendants recorded during the existence of the conspiracy. *Bruton*, however, did not involve statements such as those here, which were admissible into evidence against all defendants as the declarations of co-conspirators in furtherance of the conspiracy. *Id.* at 128, n. 3. See *Dutton* v. *Evans*, 400 U.S. 74; *United States* v. *Nixon*, 418 U.S. 683, 701; Rule 801(d)(2)(E), Fed. R. Evid. *United States* v. *Nasser*, 476 F. 2d 1111 (C.A. 7), relied upon by petitioners, is inapposite; it involves the application of the *Bruton* rule to statements that were not made by a co-conspirator in furtherance of the conspiracy.

a. It is well established that a defendant's Fourth Amendment rights are not violated when the defendant's conversations with a government informant are recorded with the consent of the informant, and petitioners do not dispute this principle. *United States* v. *White*, 401 U.S. 745; *United States* v. *Rich*, 518 F. 2d 980, 984-985 (C.A. 8). It is also clear that the fact of the informant's consent may be established through other witnesses and that the recorded conversations may be utilized at trial even if the informant is not available to testify. *United States* v. *McMillan*, 508 F. 2d 101, 104 (C.A. 8), certiorari denied, 421 U.S. 916; *United States* v. *Bonanno*, 487 F. 2d 654 (C.A. 2); *United States* v. *Marrapese*, 486 F. 2d 918, 921 (C.A. 2), certiorari denied, 415 U.S. 994; see *United States* v. *White, supra; On Lee* v. *United States*, 343 U.S. 747.[5]

b. The court of appeals correctly rejected petitioners' additional contention that the informant's consent was coerced in this case (Pet. No. 75-1838 App. A-15):

> [The informant] was not threatened, coerced or promised immunity in exchange for his consent, but was only told that his cooperation would be made known to the prosecuting attorney. Consent has been found under lesser circumstances. [See *United States* v. *Rich*, 518 F. 2d 980 (C.A. 8).] * * *

[5]Petitioners' reference (Pet. No. 75-7001, pp. 24-25) to *Roviaro* v. *United States*, 353 U.S. 53, and *United States* v. *Norton*, 504 F. 2d 342 (C.A. 8), is inapposite. Those cases involved situations in which the defendants wanted to call the informant, who had been a witness to the criminal offense and whose identity they did not know, to give allegedly exculpatory evidence on the question of guilt or innocence. Here, petitioners claim only that a known informant was required to testify concerning a claim that evidence was obtained illegally. See *McCray* v. *Illinois*, 386 U.S. 300, 305.

> Viewing the totality of circumstances surrounding the recording of [the informant's] conversations with Kirk, it seems apparent that [the informant] gave his consent freely in hopes that the prosecutor would take his cooperation into account when the prosecution began. * * * The government met its burden of proving the voluntariness of the informant's consent.

See also *United States* v. *McMillan, supra; United States* v. *Bonanno, supra.*

3. Petitioners next argue that the intercepted conversations should have been suppressed because the intercept application failed sufficiently to establish the inadequacy of other investigative procedures (Pet. No. 75-1838, pp. 9-15; Pet. No. 75-7001, pp. 30-35).

18 U.S.C. 2518(1)(c) requires that each application for an order authorizing the interception of wire or oral communications shall include, *inter alia,*

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous * * *.

Similarly, the issuing judge must find that alternative investigative procedures are inadequate (18 U.S.C. 2518 (3)(c)).

The requirement of Section 2518(1)(c) is satisfied when—viewing the affidavit in a practical and common sense fashion—a sufficient factual basis is shown from which the issuing court can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the criminal activities under investigation, or is necessary to ascertain the full scope of such criminal activities and the

identity of the participants therein. See *United States* v. *Turner*, 528 F. 2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996.[6]

The courts below correctly found the application in this case to be sufficient. It was shown in the affidavit in support of the application (see Pet. No. 75-1838, pp. 11-12) that several months of investigation—including visual surveillance, record checks, and the use of an informant to buy drugs and make recorded telephone calls—had been undertaken prior to the application for the interception order. These methods, however, had in fact failed to reveal the scope of the conspiracy or the identities of all the participants. Furthermore, the affidavit set forth Eugene Kirk's refusal to deal directly with undercover government agents and the fact that Kirk would not permit the informant to become familiar with the scope of the organization. It further explained that continued visual surveillance would be unlikely to succeed because it probably would be detected and because automobiles driven to Kirk's residence were parked in the rear of the building, thereby rendering it difficult to identify their occupants.

In sum, the facts set forth in the affidavit amply supported the issuing judge's finding that alternative investigatory methods "reasonably appear[ed] to be unlikely to succeed" in disclosing the scope of the conspiracy and

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[6]Section 2518(1)(c) "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153, n. 12. It does not require the government to try normal investigative techniques unless there is a reasonable likelihood that, if tried, such techniques would be successful. *United States* v. *Pacheco*, 489 F. 2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909; *United States* v. *Falcone*, 364 F. Supp. 877, 889 (D. N.J.), affirmed, 505 F. 2d 478 (C.A. 3), certiorari denied, 420 U.S. 955.

the identity of other participants therein, properly satisfying the requirement of 18 U.S.C. 2518(1)(c).[7]

4. Petitioners also contend that the conversations recorded during the wire interception should have been suppressed because petitioner Barnett was not named in the intercept application and order, even though, they claim, the government had probable cause to believe that her communications would be intercepted (Pet. No. 75-1838, pp. 7-9; Pet. No. 75-7001, pp. 27-29).[8] They rely upon 18 U.S.C. 2518(1)(b)(iv) and (4)(a), which provide that the application and order must include the identity of the person, if known, committing the offense and whose communications are to be intercepted.[9]

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[7]Petitioners incorrectly assert that the holding of the court below that the affidavit here was sufficient to meet the requirement of Section 2518(1)(c) is in conflict with *United States* v. *Kalustian*, 529 F. 2d 585 (C.A. 9). The *Kalustian* court apparently adopted a more stringent test for compliance with Section 2518(1)(c) than has been imposed by other courts of appeals (see, *e.g.*, *United States* v. *Steinberg*, 525 F. 2d 1126 (C.A. 2), certiorari denied, May 19, 1976, No. 75-1040). In *Kalustian*, the court held insufficient under Section 2518(1)(c) an affidavit which relied substantially upon the affiant's experience in other gambling cases to support his conclusion that normal investigative techniques would be insufficient. The affiant in the instant case, in contrast, did not rely on his experience in other narcotics cases, but upon the specific facts arising out of his investigation of Eugene Kirk to establish that the wire interception was necessary. Thus, the affidavit in the instant case was sufficient even under *Kalustian*.

[8]Only petitioner Barnett has standing to seek suppression on this basis. There has been no claim that probable cause existed as to any other individual who was not named in the wire interception order. The other petitioners cannot vicariously assert the rights of Barnett as a basis for suppression of evidence which was obtained without violating their own rights. See the government's brief in response to the petition for certiorari in *Civella* v. *United States*, No. 75-1813, pp. 6-7, a copy of which we are serving on counsel for petitioners.

[9]Although the two sections differ slightly in language, 18 U.S.C. 2518(4)(a) imposes no broader requirement than 18 U.S.C. 2518(1)(b)(iv). *United States* v. *Kahn*, 415 U.S. 143, 152.

At the time of the application for the interception order, government agents had observed sales of heroin to Nofles by some members of the Kirk organization, including petitioners Eugene Kirk, Gregory Kirk, and Audrene Hill. All the persons tied to the transactions by the observations of the agents were named in the application for the interception order. The agents did not have probable cause to believe petitioner Barnett was involved: she had not made any sales of heroin to government agents at the time of the application, nor had she been observed delivering any heroin (Tr. March 24, 1975, pp. 27-29, 36-38, 40-41).[10] The court below correctly found (Pet. No. 75-1838 App. A-19):

> The government is not required to name every person who might be recorded in the wire interception. Therefore, the fact that some of the appellants (mainly, Deborah Barnett) were not named in the application does not mean that the authorization order was invalid. The application named all the individuals whom the government had probable cause to suspect would be involved in telephone conversations with the principal, Eugene Kirk.

Given the court's factual assessment of the existence of probable cause in this case, the conflict in the circuits on the scope of the naming requirement in 18 U.S.C. 2518(1)(b)(iv) and 4(a) becomes entirely irrelevant, since no decision of any court of appeals requires the government to name persons in the application in the absence of

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[10]Although Nofles had apparently provided some uncorroborated information concerning petitioner Barnett prior to the application, and a person identified as "Debbie" had been involved in one drug-related conversation that was recorded by government agents, the agents were not aware at that time that the individual was petitioner Barnett (Tr. March 24, 1975, pp. 40-41).

probable cause. There is, accordingly, no need to defer action on this issue pending the disposition of *United States* v. *Donovan*, No. 75-212, certiorari granted, February 23, 1976, the outcome of which will not affect the proper disposition of this case.

5. Petitioners assert that the trial court erred in allowing the jury to utilize transcripts as an aid in listening to tape recordings of the intercepted conversations (Pet. No. 75-6957, pp. 8-12; Pet. No. 75-7001, pp. 14-16).

It is within the discretion of the trial judge to allow the jury to be furnished with copies of a transcript to assist them in listening to tape recordings played at trial. *United States* v. *McMillan*, 508 F. 2d 101 (C.A. 8), certiorari denied, 421 U.S. 916; *Fountain* v. *United States*, 384 F. 2d 624 (C.A. 5), certiorari denied *sub nom. Marshall* v. *United States*, 390 U.S. 1005. Petitioners have not shown that the trial judge abused his discretion in this case. The transcripts were not admitted into evidence. The agents who prepared the transcripts testified as to their accuracy, which petitioners had an opportunity to verify before the transcripts were provided to the jury. Furthermore, the trial court repeatedly instructed the jury that the transcripts were not evidence, but were merely the conclusions of the persons who prepared them, and that the transcripts were to be disregarded in case of any variance between the transcripts and the tapes (Tr. 223, 258, 302, 315, 434, 444, 1270-1271, 2385-2386).

Petitioners, relying on *Chavez* v. *Dixon*, 280 F. 2d 727 (C.A. 9), certiorari denied, 364 U.S. 934, and *United States* v. *Carson*, 464 F. 2d 424 (C.A. 2), assert that the trial judge was required to listen to the tapes prior to trial and make a specific finding of fact concerning the accuracy of the transcripts. *Chavez* did not involve the use of transcripts as an aid in listening to tape recordings, but instead concerned

the admission of allegedly inaccurate transcripts into evidence in lieu of the actual recordings. In *Carson*, the court of appeals did not require the trial judge himself to assess the accuracy of the transcripts; instead, it held that he properly allowed the defendants to examine the transcripts prepared by the government and prepare their own version where the parties could not agree. Petitioners were afforded a similar opportunity here, but they failed to act on it (Tr. February 5, 1975, pp. 14, 42). Even now, petitioners do not cite any discrepancies between the recordings and the transcripts. Finally, petitioners' claim of error is wholly refuted by the court of appeals' conclusion about this matter, reached after having listened to "virtually all of the tapes played for the jury" (Pet. No. 75-1838 App. A-23):

> [O]nce the ear is attuned and the listener becomes familiar with the dialect and inflections, the tapes are not incapable of comprehension and the relevant conversations which were transcribed become clearly understandable. Surely the jury would also be capable of understanding the recordings and making distinctions between the recorded conversations and the transcribed ones, if there were any.

6. Petitioner Eugene Kirk contends that the continuing criminal enterprise statute, 21 U.S.C. 848, is unconstitutionally vague on the ground that it fails to quantify precisely what constitutes "substantial income or resources" (Pet. No. 75-7001, pp. 17-18).

Section 408(b), Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1266, 21 U.S.C. 848(b), provides that a person is engaged in a continuing criminal enterprise if he commits a felony which

> * * * is a part of a continuing series of [narcotics violations]—
>
> (A) which are undertaken by such person in concert with five or more other persons with repect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

Every court that has considered the question has held that 21 U.S.C. 848 is not unconstitutionally vague. *United States* v. *Cravero*, 536 F. 2d 637, 641-642 (C.A. 5); *United States* v. *Sperling*, 506 F. 2d 1323 (C.A. 2), certiorari denied, 420 U.S. 962; *United States* v. *Sisca*, 503 F. 2d 1337 (C.A. 2), certiorari denied, 419 U.S. 1008; *United States* v. *Manfredi*, 488 F. 2d 588 (C.A. 2), certiorari denied, 417 U.S. 936; *United States* v. *Collier*, 493 F. 2d 327 (C.A. 6), certiorari denied, 419 U.S. 831.

It is well settled that "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States* v. *Mazurie*, 419 U.S. 544, 550. As the court below observed (Pet. No. 75-1838, App. A-25 to A-26):

> There was overwhelming evidence at trial establishing Kirk as the leader of a large and active narcotics distribution conspiracy. During the twenty days of the wire interception he received and made an incredible number of calls involving suppliers, distributors and buyers. The evidence established that Kirk dealt in large quantities of heroin and dealt with sufficient money to be able to send agents to New York and California to buy heroin. It was quite obvious that the work occupied Kirk on a more than full time basis, apparently for a number of years. * * *

Although the phrase "substantial income or resources" may not be quantitatively exact, in view of the evidence

presented here it "strains at technicalities to say that any issue of vagueness * * * as construed and applied is present in the case." *Williams* v. *United States*, 341 U.S. 97, 104. Cf. *United States* v. *Powell*, 423 U.S. 87; *Parker* v. *Levy*, 417 U.S. 733.

7. Petitioners assert that the jury selection plan of the Eastern District of Missouri is unconstitutional because the list of potential jurors is compiled from voting lists after each presidential election, thereby excluding from service those persons who reach voting age during the interim between the election and the trial. They also argue that in failing to remedy this alleged defect by prescribing an alternative source for the selection of additional names, the plan fails to comply with provisions of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* (Pet. No. 75-7001, pp. 36-40).

In *Hamling* v. *United States*, 418 U.S. 87, this Court rejected a similar contention. This Court recognized in *Hamling* that "some play in the joints of the jury-selection process is necessary in order to accomodate the practical problems of judicial administration" and that " 'purposeful discrimination' does not arise near the end of the period simply because the young and other persons have belatedly become eligible for jury service by becoming registered voters." *Id.* at 138.

An alternative source for the selection of additional names is required only where necessary to foster the purposes of the Jury Selection and Service Act. 28 U.S.C. 1863(b)(2). The specified purposes include the selection of a jury at random from a fair cross section of the community, without discrimination on account of race, color, religion, sex, national origin or economic status. 28 U.S.C. 1861 and 1862. Since the instant case involves

merely a justifiable administrative delay, not discrimination in violation of the purposes of the statute, see, *Hamling* v. *United States, supra*, 418 U.S. at 136-138, an alternative source was not required. See *United States* v. *Freeman*, 514 F. 2d 171 (C.A. 8); *United States* v. *Olson*, 473 F. 2d 686 (C.A. 8), certiorari denied, 412 U.S. 905.

8. Contrary to petitioners' assertion (Pet. No. 75-7001, pp. 12-13), the trial court did not err in admitting into evidence the testimony of several chemists who identified certain exhibits as heroin, without first making a determination concerning the general acceptance in the scientific community of the identification techniques used by the chemists. Since there is no indication in the record that the chemists used anything other than well established standard procedures in analyzing the suspected heroin, there was no need for an inquiry by the trial court into the general scientific acceptance of such techniques. *Moreno* v. *United States*, 391 F. 2d 280 (C.A. 5). Unlike the cases upon which petitioners rely, which involve the controversial techniques of polygraph testing and voice identification by spectrograph, qualitative analysis of substances to identify heroin is universally accepted as a proper subject for expert testimony. See *United States* v. *Nelson*, 499 F. 2d 965 (C.A. 8).

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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